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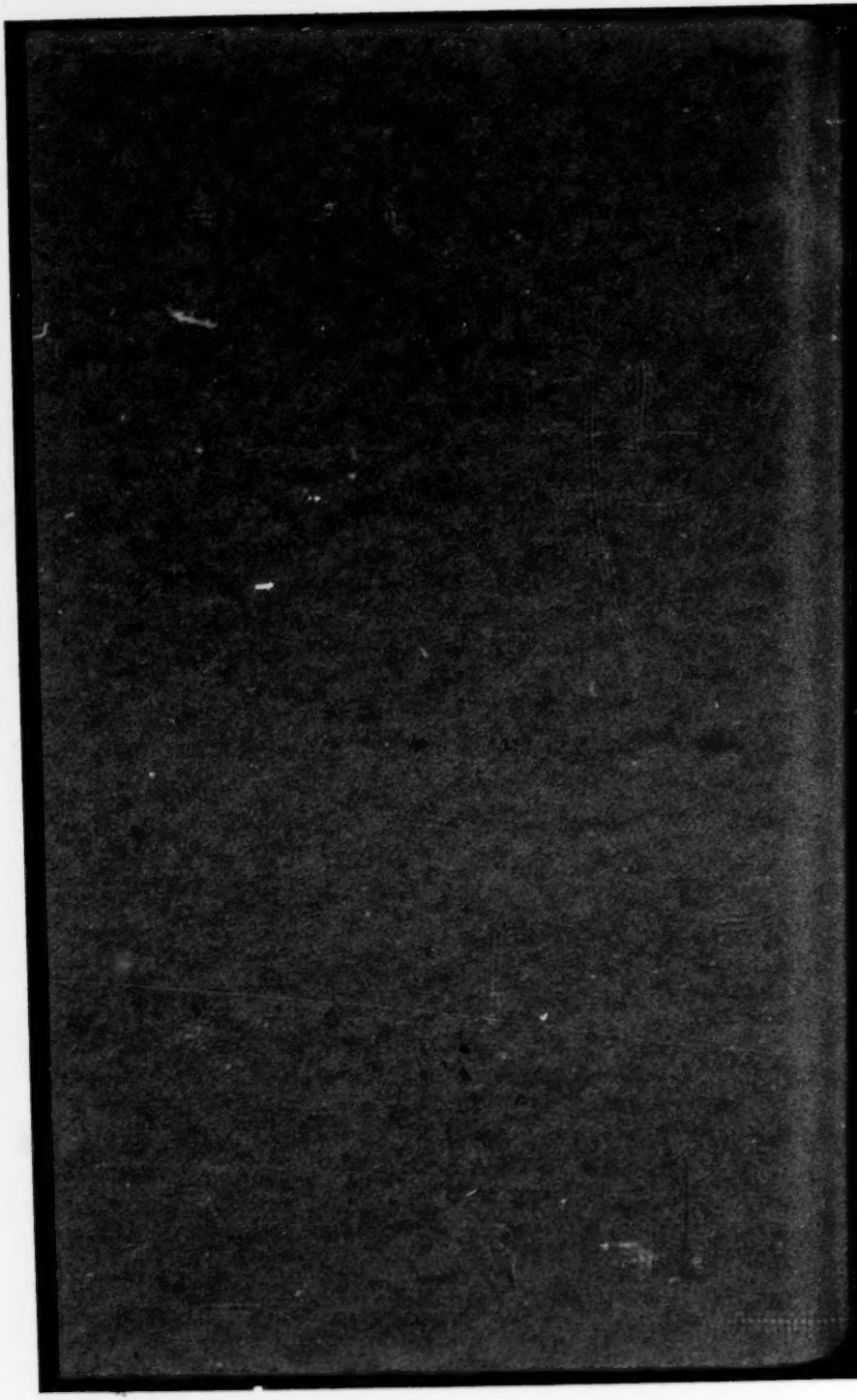

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In the

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-922

MARY LOUISE GREEN PASCHALL, ET AL.,
Appellants,

VERSUS

CHRISTIE-STEWART, INC., ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

REPLY BRIEF—RESPONSE TO MOTION TO DISMISS AND/OR AFFIRM

In the Argument presented in the Motion to Dismiss and/or Affirm filed herein, Appellees have cited certain state and federal decisions from which it is argued that notice to a real property owner is unnecessary before the taking of his property by taxing agencies. The case of *Leigh* v. *Green,* 193 U.S. 79, 24 S.Ct. 390, 48 L.Ed. 623 (1904), is relied upon as the ultimate and base reference point from which the other cited cases stem.

Leigh v. *Green, supra,* was a historical precedent for the proposition, long adhered to, that the "most summary methods of seizure and sale for the satisfaction of taxes and

public dues have been held to be authorized, and not to amount to the taking of property without due process." This was because of the distinction clearly made in the case that the action was *in rem:* "The notice was good as against the world, and all that is necessary when the proceedings are *in rem.*" *Cornelius* v. *Jackson,* 201 Okla. 667, 209 P.2d 166 (1949), which is cited by Appellees as an Oklahoma precedent in their favor, uses the same rationale of *in rem* procedure and in fact relies upon *Leigh* v. *Green* in reaching the conclusion that the owner of the mineral interest in Oklahoma land there under consideration was not deprived of due process in the taking of his property through the tax sale. Likewise, Appellees cite Kansas law, spec. *Robertson* v. *Lemmon,* 189 Kan. 619, 371 P.2d 175 (1962), to the same effect, and that case also turns on the *in rem* distinction, quoting from *Leigh* v. *Green.*

It is important to note, however, that the United States Supreme Court, in *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), rejected the distinction between *in rem* and *in personam* proceedings insofar as it might affect constitutional guaranties: "... we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state . . . Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the na-

ture of the case." The language and holding of *Mullane*, when coupled with the subsequent holdings of this Court based thereon, including *Covey* v. *Town of Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956), *Walker* v. *City of Hutchinson*, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178, and *Wisconsin E. P. Co.* v. *City of Milwaukee*, 352 U.S. 948, 77 S.Ct. 324, 1 L.Ed.2d 241 (1956), make clear that after 1950 the taking of title to property through judicial or administrative action, including tax sales, must be attended with much more regard toward notifying the owner of the property that his rights are about to be changed or extinguished or transferred. State legislatures have responded by tightening statutory requirements for notice and state courts have recognized the changed standards in many decisions since *Mullane*. The result is that *Leigh* v. *Green*, and state and federal decisions based upon that view of due process requirements, have been either affirmatively or impliedly overruled.

Indeed, Kansas has in effect overruled *Robertson* v. *Lemmon, supra*, by the decision of *Chapin* v. *Aylward*, 464 P.2d 177 (1970), which deals with the same tax lien foreclosure procedure and recognizes the need for the changed result by reason of *Mullane* and *Walker*. It should also be considered that Kansas uses a judicial foreclosure procedure as distinguished from the Oklahoma administrative tax sale. Even with the protection of judicial procedure, full notice is of course required. The need for notice in administrative proceedings is at least as great when property rights are in jeopardy.

In Oklahoma, *Cornelius* v. *Jackson* has been diluted considerably by the decision by the Oklahoma Supreme

Court in *Walker* v. *Hoffman*, 405 P.2d 57 (1965). The latter case deals with a certificate tax deed as compared with a resale deed in the present case, and holds that notice to the mineral owner, separate from the surface owner, is essential to acquire the mineral rights through the tax sale. In the present case, the distinction between the resale and certificate deed was held to be sufficient to permit the resale deed to cover the minerals. And yet, in neither case did the mineral owner have notice of the tax sale and in both cases the county was the selling party.

The rationale of the Supreme Court of Oklahoma and the first and basic argument of Appellees, in the present case, is that the real estate tax statute itself is notice to all real property owners that if the taxes are not paid, the land will be sold. The same argument was available to hold the certificate tax deed valid as to the minerals in *Walker* v. *Hoffman*, but it was not given effect. The inconsistency is obvious, and creates a situation where denial of equal protection of the law exists as between mineral owners whose rights thus depend upon which tax foreclosure mechanism is used. The case of *Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692, cited by Appellees, does not hold that the state statute itself gives ample notice of impending taking of property. The question there was simply how much notice is required where the property (inactive bank account) is presumed abandoned. The decision was merely that posting on the court house door was satisfactory under those circumstances for due process requirements. Furthermore it should be noted that the case does not involve a change of title to property but merely a transfer of possession from the bank to the state.

Without here attempting a full brief in opposition to the theory that the real estate tax statute itself is sufficient notice, we merely point out that to hold that a statute gives ample notice of the jeopardy one's property is in, is to assume the validity of the facts upon which the sale is made. Suppose on the contrary that the taxes had been paid and that an administrative error was responsible for the property's inclusion in the tax sale. Without notice of the proposed sale, there would be no immediate opportunity to controvert the basic premise of the tax sale and if the sale were later discovered, the right to redeem might have expired. It had in the present case before the sale was discovered by Appellants. That administrative errors occur occasionally is well known in Oklahoma as in other states and is made vividly (almost humorously) clear by the case cited by Appellees in their Motion to Dismiss and/or Affirm, *Ponder* v. *Ebey*, 194 Okla. 407, 152 P.2d 268 (1944). In that case the owner of the land had, on seven separate contacts with the County Treasurer, attempted to pay the ad valorem taxes which were assessed against his property, but by reason of seven successive administrative errors, it was nevertheless included in the tax sale and sold to defendant. The litigation which resulted from these administrative errors concluded favorably to the plaintiff, but the issue was in doubt for more than 4 years during the expensive judicial procedure necessary to remedy the errors.

For a more full treatment of the constitutional aspects of Oklahoma tax sale procedure, see 20 Okla. L.R. 365.

CONCLUSION

This case presents constitutional questions concerning tax sales procedures used in a large number and wide geographical distribution of states. The question of constitutional notice is important in such procedures and the cases decided to this date leave the specific question in doubt. We respectfully urge, therefore, that this case be accepted for briefing and oral argument.

Respectfully submitted,

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March, 1973

CERTIFICATE OF SERVICE

I hereby certify that the following, who are all of the parties required by law to be served in the above case, were this day mailed three copies of the foregoing Reply Brief in Response to Motion to Dismiss and/or Affirm, postage prepaid:

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Dated this ..... day of March, 1973.

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